BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARLOS PEREZ-LOPEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
SEABOARD FARMS, INC.	)	
Respondent	)	Docket No. 268,120
	)	
AND	)	
	)	
FIDELITY AND GUARANTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Both parties request review of the May 20, 2005 Review and Modification Decision by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on August 9, 2005.

APPEARANCES

Thomas R. Fields, of Kansas City, Kansas, appeared for the claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, both parties agreed that if claimant is found to be entitled to a modification of his award to include a work disability, it would commence June 10, 2004, the date claimant was terminated from his position with respondent and thus was earning less than a comparable wage.

ISSUES

The ALJ granted claimant's request for modification of the January 27, 2003 Award. In doing so, she awarded claimant a 64.5 percent work disability based upon a 56 percent wage loss and a 73 percent task loss. The 56 percent wage loss reflects a factual finding that claimant failed to demonstrate a good faith effort to find appropriate employment following his dismissal from respondent's employ.

Respondent appeals this decision alleging claimant failed to establish the requisite change in his physical condition since the time of the initial award. And even if modification were appropriate, respondent contends the ALJ failed to calculate the modified Award properly. Respondent suggests that "[t]he court [the ALJ] in calculating the modified award failed to offset the weeks that claimant had been earning at least 90 % of his average gross weekly wage as required by K.S.A. 44-510e(a)."[1] Respondent urges the Board to modify the ALJ's Award, offsetting the 126 weeks between the time the functional impairment was paid out up to the time he ceased working for respondent against any work disability award.

Claimant also appeals the ALJ's Review and Modification Decision alleging that the ALJ erred in concluding he failed to put forth a good faith effort to find appropriate employment after June 9, 2004. Thus, claimant argues that the ALJ erred in imputing a wage to claimant for purposes of calculating his work disability. Claimant contends his actual wage loss of 100 percent should be used and when averaged with a 91 percent task loss, he maintains entitles him to a 95.50 percent work disability.

The issues to be addressed in this appeal are as follows:

1. Whether review and modification was appropriate; and if so,
2. The nature and extent of claimant's work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Review and Modification Decision should be affirmed.

Claimant suffered a compensable injury to his low back and received treatment from several medical providers. Following his release to return to work, respondent took claimant back and assigned him to a receiving position that involved counting and separating as many as 6,000 pigs per day. Claimant had assistance for his job and was apparently able to do all of his required duties without problems.

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[1] Respondent's Brief at 9-10 (filed Jun. 24, 2005).

Claimant's workers compensation claim was the subject of an Agreed Award dated January 27, 2003. This Award reflected an impairment of 15 percent permanent partial disability (ppd) to the whole body and entitled claimant to a payment of 62.25 weeks of ppd all of which was due and owing at the time of his settlement. All other issues remained open including the right to request a review and modification under K.S.A. 44-528.

Claimant continued to work for respondent without complaint until February 2003 when he was assigned additional job duties. He was required to vaccinate the thousands of pigs received each day. According to claimant, he was required to repetitively bend over to perform the injection and this activity caused his back pain to increase.

In March 2003, claimant advised his lawyer of the increase in back pain. Claimant's counsel then contacted Dr. Vito Carabetta, the physician who performed the Court ordered independent medical evaluation (IME). After providing Dr. Carabetta with a written description of claimant's job duties in receiving, as well as the requirement that he repetitively vaccinate each pig, counsel asked whether restrictions were appropriate. On March 28, 2003, Dr. Carabetta issued a written report which included the following restrictions: occasional lifting of 50 pounds and frequent lifting or carrying of 25 pounds. On only an occasional basis is claimant permitted to participate in bending or stooping activities.[2]

Claimant delivered these restrictions to respondent and they were honored until June 9, 2004. At that point, claimant was advised he could no longer be accommodated and was let go. He was told to call in every 8 days to see if work was available.

Since June 9, 2004, claimant has sought employment 2-3 times per week. He has submitted applications at various businesses as evidenced by his handwritten list. This list contains 56 entries, but no dates or contact names. It is written in English, apparently with the assistance of his children. There is no indication of how many times he contacted each business, whether positions were then available, or what sort of job he was seeking. Claimant has also apparently contacted respondent regularly, however, no job has been offered to him.

Michael Dreiling, the vocational expert retained by claimant, testified that claimant has the capacity to earn $5.15 per hour. He also analyzed claimant's vocational history and outlined a total of 11 pre-injury tasks, not including the task of repetitively vaccinating pigs.

None of the physicians involved in this claim have seen claimant since he entered into the Agreed Award in January 2003. Dr. William Reed, claimant's treating physician, began treating him in February 2001. Dr. Reed ordered a variety of diagnostic tests including a myologram, CT scan and MRI scan, each of which was either normal or inconclusive. With respect to the MRI, Dr. Reed believed the results did not reveal any true pressure on the

[2] Carabetta Depo. at 12.

nerve structure in claimant's spinal cord. Nonetheless, he ordered epidural injections which were helpful, but only for a short period of time.

Dr. Reed testified that in his view, restrictions were not necessary at the time he released claimant because there were no specific abnormalities as evidenced by the myelogram or CT scan. He did, however, suggest that claimant should seek an occupation that would allow him to be self-limiting and include duties that would let him work comfortably. The parties seem to concede that Dr. Reed's lack of restrictions translate to a 0 percent task loss.

At his counsel's request, claimant was also evaluated in August 2001, by Dr. Pedro Murati. Dr. Murati diagnosed mid-back pain secondary to a bilateral L5 radiculopathy. At that point Dr. Murati recommended conservative treatment and imposed restrictions of no bending at the waist or crawling, no lifting, carrying, pushing or pulling over 20 pounds and only occasional climbing stairs, ladders and squatting. Claimant was also told to avoid the twisting of his trunk and to alternate sitting, standing and walking.[3]

Dr. Murati testified that absent significant treatment or results, these restrictions are considered permanent. He further testified that claimant's task loss was 91 percent based upon Mr. Dreiling's task analysis.

The ALJ appointed Dr. Vito Carabetta to perform an IME pursuant to K.S.A. 44-510e(a). In his report dated April 18, 2002, Dr. Carabetta assigned a 15 percent permanent partial impairment for claimant's diagnosed lower thoracic disk herniation at T10-11. He did not, however, assign any restrictions at that time.

When deposed in connection with claimant's request for a review and modification of his Award, Dr. Carabetta indicated that under normal circumstances he would have imposed restrictions upon an individual with an injury such as that sustained by claimant. But, based upon claimant's recitation of his job duties in receiving and Dr. Carabetta's perception that claimant was more of a supervisor, he felt restrictions were unnecessary. The claimant purportedly indicated to Dr. Carabetta that he wanted to continue working and that Dr. Carabetta did not want to "tie his hands".[4] Thus, he assigned no restrictions.

In a subsequent letter from claimant's counsel in March 2004, Dr. Carabetta was given additional information about claimant's job duties including the job of vaccinating the pigs. Based upon those representations, he issued a report imposing restrictions upon claimant's work activities. After reading claimant's subsequent testimony from the Review and Modification hearing, Dr. Carabetta considered these restrictions permanent. And when compared to Mr. Dreiling's task analysis, opined claimant bears a 73 percent task loss.

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[3] Murati Depo., Ex. 2 at 4.

[4] Carabetta Depo. at 10.

When the additional task of vaccinating pigs is included, the task loss increases to 75 percent.

In June 2004, when respondent could no longer accommodate the restrictions issued by Dr. Carabetta, claimant was laid off. Consequently, claimant filed this request for a review and modification of his Award.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[5]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[6] If there is a change in the claimant's work disability, then the award is subject to review and modification.[7]

In a review and modification proceeding, the burden of establishing changed conditions is on the party asserting them.[8] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[9]

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[5] K.S.A. 44-528(a).

[6] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[7] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 929 P.2d 788 (1996).

[8] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[9] *See*, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

The ALJ concluded claimant was entitled to a modification of his award in light of the subsequent work-related developments. The Board agrees and affirms this finding. Contrary to respondent's contention, a physical change is not required in every instance. The Act contemplates a change in circumstances and that change is not limited solely to an employee's physical condition. Here, the change in circumstance was the respondent's decision to stop honoring claimant's restrictions. Such a change is precisely an event that K.S.A. 44-528 was intended to address. While an increase in physical symptoms or a deterioration in a claimant's condition is a justifiable reason to modify an award, so too is an employer's failure, under these circumstances, to accommodate an injured worker's permanent restrictions relating to his work-related injury.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[10] and *Copeland*.[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute)

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[12]

The ALJ concluded claimant failed to make a good faith effort to secure appropriate employment following his layoff from respondent's plant. The Board agrees and affirms this finding. Since June 10, 2004 and up to December 13, 2004 (the date of the hearing) claimant had purportedly contacted 56 potential employers. He testified that he had been contacting 2-3 employers a week. While those numbers might be sufficient in some contexts, the Board is not persuaded that claimant's effort was exhaustive under these facts.

Although claimant provided a list of his job contacts, that list is not terribly informative. Neither the list, nor the record indicates what sort of job claimant was seeking, the dates he sought the employment, the contact person, whether any job was actually available at the time, or what he was told in response to his inquiry. While there may be no challenge to the fact that he actually made those inquiries, the good faith contemplated by *Foulk* and *Copeland* certainly encompasses more than a list of names and telephone numbers. Based upon this record, the Board is unable to ascertain whether claimant has made a genuine or a mere token effort to find appropriate employment as required by *Foulk* and its progeny. And as such, finds claimant has failed to meet his burden of proof on this issue. Thus, the Board affirms the ALJ's conclusion that claimant failed to demonstrate a good faith effort to find appropriate employment.

Having affirmed the ALJ's conclusion that claimant failed to establish good faith, the Board likewise affirms the ALJ's imputation of a minimum wage job and the resulting 56 percent wage loss. The only evidence contained within the record suggests that claimant is capable of earning $5.15 per hour on a full-time basis. This wage translates to a 56 percent wage loss when compared to his pre-injury average weekly wage.

The second prong of the work disability computation requires the Board to consider claimant's task loss. The ALJ adopted Dr. Carabetta's opinions on this issue and assigned a 73 percent task loss. The Board has examined each physicians' task loss opinion and finds no compelling reason to disturb the ALJ's finding on this issue. Thus, the 73 percent task loss is affirmed as is the ultimate work disability finding of 64.5 percent.[13]

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[12] *Id.* at 320.

[13] The task loss opinions considered by the Board did not include the post-injury task of vaccinating pigs.

As for respondent's argument with respect to the ALJ's calculation of the Award, there is no dispute that claimant was entitled to 62.25 weeks of ppd for his 15 percent functional impairment. This aspect of his original Award was payable in full as of the week of January 6, 2002, as the statute indicates that claimant's impairment presumptively begins on the date of his accident.[14]

Thereafter, claimant continued to work for respondent and both parties agree claimant earned at least 90 percent of his pre-injury wage up to June 9, 2004. Thus, under K.S.A. 44-510e(a) is not entitled to a work disability until June 10, 2004, when he was terminated.

What respondent urges the Board to do is to consider the 126 weeks between the time the functional impairment was paid up to June 10, 2004 when calculating claimant's work disability. Respondent argues that because claimant's impairment began immediately after his injury, then the 415 week period begins to run regardless of whether benefits were paid during any of those weeks. In essence, respondent wants an offset or a credit for those weeks it paid no benefits.

The Board finds respondent's argument flawed. First, claimant was not entitled to any work disability benefits until June 10, 2004, when respondent terminated him from his accommodated position. He was earning 90 percent of his pre-injury wages and could not, under the statute, qualify for work disability. So, in calculating the work disability award it would be illogical for respondent to get any sort of credit against a work disability award for a period of time in which claimant was not entitled to work disability. Second, respondent's argument seems to suggest that it should get credit for a period of time *in which it paid no benefits*. Claimant received his functional impairment award when he entered into his Agreed Award. At that point, respondent owed claimant no further benefits until it decided it could no longer accommodate claimant. At that point, claimant's work disability emerged. Respondent's argument that it should get a credit or offset for that period of time claimant was precluded from work disability benefits and had no obligation to pay is nonsensical.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Decision of Administrative Law Judge Pamela J. Fuller dated May 20, 2005, is affirmed.

[14] K.S.A. 44-510e(a).

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned members respectfully dissent from the majority's opinion and would find that claimant had demonstrated a good faith effort to obtain appropriate employment following his termination from his job with respondent. Claimant resides in an area of the state which has limited employment possibilities. In addition, he has a language barrier and physical restrictions which further limit his employment prospects. Given these barriers and the fact that he made 55 contacts between June 9, 2004 and the time of his hearing, which represents at least 2 attempts per week to obtain employment, the undersigned would reverse the ALJ and would not impute any wage and would instead use claimant's actual wage loss for purposes of calculating his work disability.

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BOARD MEMBER

_____
BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director